

IN THE SUPREME COURT

**APPEAL FROM THE
MICHIGAN COURT OF APPEALS**

Judges Patrick M. Meter, Michael J. Talbot, and Stephen J. Borrello

THE DETROIT EDISON COMPANY,
Appellant,

Supreme Court No. 125950

v

Court of Appeals No. 237872

MICHIGAN PUBLIC SERVICE COMMISSION, et al,
Appellees.

MPSC Case No. U-12134

MICHIGAN ELECTRIC COOPERATIVE
ASSOCIATION, et al,
Appellants,

Supreme Court No. 125954

v

Court of Appeals No. 237873

MICHIGAN PUBLIC SERVICE COMMISSION, et al,
Appellees.

MPSC Case No. U-12134

CONSUMERS ENERGY COMPANY,
Appellant,

Supreme Court No. 125955

v

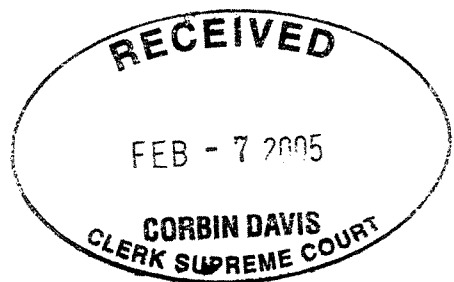
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MICHIGAN PUBLIC SERVICE COMMISSION, et al,
Appellees.

MPSC Case No. U-12134

BRIEF ON APPEAL — APPELLEE
MICHIGAN ALLIANCE FOR FAIR COMPETITION

ORAL ARGUMENT REQUESTED



Roderick S. Coy (P12290)
Haran C. Rashes (P54883)
Clark Hill PLC
212 East Grand River Avenue
Lansing, MI 48906
(517) 318-3100
(517) 318-3099 Fax

Attorneys for
Michigan Alliance for Fair Competition

Dated: February 7, 2005

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CONCURRENCE WITH STATEMENTS OF JURISDICTION

Appellee Michigan Alliance for Fair Competition (“MAFC”) concurs in the Statements of Jurisdiction stated in the briefs of the Appellants, The Detroit Edison Company (“DECo” or “Detroit Edison”), Michigan Electric Cooperative Association (“MECA”) and its distribution rural electric cooperative members (Alger Delta Cooperative Electric Association, Cherryland Electric Cooperative, Cloverland Electric Cooperative, Great Lakes Energy Cooperative, Homeworks Tri-County Electric Cooperative, Midwest Energy Cooperative, the Ontonagon County Rural Electrification Association, Presque Isle Electric & Gas Co-Op, and Thumb Electric Cooperative) and Consumers Energy Company (“CECo”) (collectively, the “Appellants”).

The Appellants applied for leave to appeal from the Michigan Court of Appeals decision in *Detroit Edison Co v Public Service Comm’n*.¹ On November 5, 2004, this Court granted the Application for Leave to Appeal, limiting the issues as follows:

“On order of the Court, the application for leave to appeal the March 2, 2004 judgment of the Court of Appeals is considered, and it is GRANTED. The parties are directed solely to brief whether the December 2000 and October 2001 orders of the Michigan Public Service Commission are unlawful because they were not promulgated in conformity with the rule-making provisions of the Administrative Procedures Act, MCL 24.201 et seq.”²

This Court has jurisdiction to review these consolidated cases by appeal pursuant to MCR 7.301(A)(2) and MCR 7.302(G)(3).

¹ 261 Mich App 1; 680 NW2d 512 (2004), *lv granted*, ___ Mich __; 688 NW2d 510 (2004) (“*Court of Appeals Decision*”).

² *Detroit Edison Co v Public Service Comm’n*, ___ Mich __; 688 NW2d 510 (2004) (Appellants’ Appendix, pp. 243a-244a.)

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. **DID THE COMMISSION PROVIDE ADEQUATE DUE PROCESS, UNDER THE ADMINISTRATIVE PROCEDURES ACT, TO THE APPELLANTS IN ENACTING THE CODE OF CONDUCT PURSUANT TO A CONTESTED CASE PROCEEDING?**

Appellee MAFC answers: Yes

Appellee MPSC is expected to answer: Yes

The Court of Appeals answered: Yes

Appellants answered: No.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. Introduction

In enacting Section 10a(4) of the Customer Choice and Electricity Reliability Act³ the Michigan Legislature (“Legislature”) directed the Michigan Public Service Commission (“Commission” or “MPSC”) to:

“Within 180 days after the effective date of the amendatory act that added this section, the commission shall establish a code of conduct that shall apply to all electric utilities. The code of conduct shall include, but is not limited to, measures to prevent cross-subsidization, information sharing, and preferential treatment, between a utility’s regulated and unregulated services, whether those services are provided by the utility or the utility’s affiliated entities. The code of conduct established under this subsection shall also be applicable to electric utilities and alternative electric suppliers consistent with section 10, this section, and sections 10b through 10bb.”⁴

Within the required 180 days, the Commission issued an Opinion and Order establishing the Code of Conduct.⁵

MAFC was one of the many entities that participated in the Commission’s contested case proceeding to establish the Code of Conduct. MAFC is an alliance of Michigan contractors, contractor associations, labor unions and others interested in obtaining fair competition with Michigan’s utilities.⁶ To accomplish this goal, MAFC works with the Michigan Legislature, the Michigan Public Service Commission and within the judicial process to prevent cross-

³ Customer Choice and Electricity Reliability Act, 2000 PA 141, MCL 460.10 *et seq.*

⁴ MCL 460.10a(4).

⁵ *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134, Opinion and Order, Dec 4, 2000, 205 PUR4th 508 (“*Code of Conduct Order*”).

⁶ For a list of MAFC members, please see Appellee MAFC Appendix p 1b.

subsidization between monopoly utilities' regulated and non-regulated business ventures and to prevent unfair competitive practices by the utilities. MAFC intervened in the Code of Conduct proceeding to protect its substantial interest and because the small businesses who are members of MAFC or members of its member associations directly compete with affiliates or divisions of the monopoly utilities doing business in Michigan. MAFC supports the Code of Conduct because its absence would allow the affiliates or divisions of the monopoly utilities to engage in unfair trade practices and cross-subsidization, information sharing, and preferential treatment between their regulated and unregulated services, whether those services are provided by the regulated monopoly utility or the utility's affiliated entities. This, in turn, would permit the unregulated affiliate to take advantage of a regulated monopoly utility's market power, perception of regulation, and guaranteed rate of return, allowing the unregulated affiliate an unfair advantage over the small business persons who comprise the membership of MAFC and MAFC's member organizations.

In consideration of CEC's and DECO's requests for waivers from certain sections of the Code of Conduct, the Commission specifically noted the applicability of the Code of Conduct to those areas in which CEC and DECO compete with members of MAFC.

“One way to assure that a utility's resources are not being used to unfairly subsidize these business activities or to unfairly influence the local markets is to require full functional separation, preferably through an affiliate, for heating and air conditioning services; i.e., to deny the requested waivers for heating and air conditioning services. . . . For the company's appliance service plan, customer-requested services, and heating and air conditioning sales, the Commission will require that heating and air conditioning services be provided through full functional separation, preferably through a separate affiliate, i.e. no waivers will be granted for these

programs and any other heating and air conditioning services that are actively marketed or promoted by the utility.”⁷

Unwilling to accept what the Commission characterized as, “the reasonable terms set out in the code of conduct”⁸ that would limit the application of their monopolistic advantage, and limit their ability to cross-subsidize, share information, and grant preferential treatment, between their regulated and unregulated services, the Appellants appealed the *Code of Conduct Order* to the Michigan Court of Appeals. Following affirmation of the *Code of Conduct Order*, in its entirety, the Appellants sought, and were granted, leave to appeal to this Court.

The Appellants request that this Court find that the Code of Conduct is unlawful because it was not promulgated in conformity with the rule-making provisions of the Administrative Procedures Act (“APA”).⁹ Such relief would ignore the extensive due process offered the Appellants, and indeed all parties, by the Commission in establishing the Code of Conduct through a contested case proceeding under permissive statutory authority.

If the Code of Conduct is nullified and vacated, the result will be that the Appellants, monopoly electric utilities, will be free to leverage the monopoly power of their regulated electric utilities in an anticompetitive manner to cross-subsidize, share information, and grant preferential treatment to their unregulated affiliates. Among these unregulated affiliates, are

⁷ *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134 (Consumers Energy), Opinion and Order, Oct 3, 2002, p 4 (“CECo Waiver Order”) (Appellants’ Appendix p 144a); *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134 (Detroit Edison), Opinion and Order, Oct 3, 2002, p 4 (“DECo Waiver Order”)(Appellants’ Appendix p 135a).

⁸ *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134 (Cooperatives), Opinion and Order, Oct 3, 2002, p 3 (“Cooperatives Waiver Order”) (Appellants’ Appendix p 152a).

⁹ MCL 24.201 *et seq.*

affiliates of CECo and DECo who are competing with members of MAFC in the provision of heating and air conditioning services and appliance repair services throughout the state of Michigan.

MAFC respectfully requests that this Court deny the relief requested by the Appellants and uphold the Code of Conduct.

B. Michigan Public Service Commission Proceedings and Rulings in this Case.

The subject of this Appeal is the process used by the Commission to establish the Code of Conduct. The Code of Conduct was developed as the result of prolonged and extensive contested case proceedings before the Commission. Though the Appellants' Statements of Facts mention these contested case proceedings, the Appellants fail to explain just how extensive the proceedings were and how much fundamental due process was afforded to all parties involved. MAFC has participated in all aspects and phases of the proceedings that developed the Code of Conduct.

The Code of Conduct proceedings had their origin in the provisional Codes of Conduct under which monopoly electric utilities, CECo and DECo, operated since 1999.¹⁰ These provisional and voluntary Codes of Conduct were designed to govern the relationships between the utilities and their affiliates participating in retail open access in their service territory. In 1999, the Commission recognized the need for a broader Code of Conduct applicable to the incumbent monopoly utilities as they began to compete in non-regulated fields and for the first

¹⁰ CECo's provisional Code of Conduct was approved in *In the Matter, on the Commission's Own Motion to Consider Restructuring of the Electric Utility Industry*, MPSC Case Nos. U-11290, *et al*, Opinion and Order, Mar 8, 1999, 191 PUR4th 523. DECo's provisional Code of Conduct was approved in *In the Matter, on the Commission's Own Motion to Consider Restructuring of the Electric Utility Industry*, MPSC Case No. U-11290, Opinion and Order, Sep 14, 1999 (Appellants' Appendix pp 44a-46a).

time faced electric competition in Michigan. To meet this need, the Commission began the proceedings that ultimately resulted in the present appeal to this Court.¹¹ In the *Order Initiating Case*, “the Commission conclude[d] that a contested case proceeding should be initiated for the purpose of determining what modifications, if any, should be made to the existing Codes of Conduct,”¹² “because . . . informal meetings designed to develop a permanent code have proved unavailing and there appears to be little prospect for consensus to be reached.”¹³

Contested case proceedings were held over the next nine months, pursuant to the APA.¹⁴ The participants in this contested case proceeding included the Appellants; CECo and DECo as named parties and MECA and MAFC as intervenors. At the close of the initial proceedings, on May 25, 2000, the record consisted of 681 pages of testimony and 23 exhibits from 15 witnesses.

The significance of the Code of Conduct, then under consideration by the Commission, was emphasized only days before initial briefs were due to be filed. On June 3, 2002, then Governor John Engler signed the Customer Choice and Electricity Reliability Act¹⁵ into law. Section 10a(4) of the Customer Choice and Electricity Reliability Act provides:

“Within 180 days after the effective date of the amendatory act that added this section, the commission shall establish a code of conduct that shall apply to all electric utilities. The code of conduct shall include, but is not limited to, measures to prevent cross-subsidization, information sharing, and preferential treatment, between a utility’s regulated and unregulated services, whether those services are provided by the utility or the utility’s affiliated

¹¹ *In the Matter on the Commission’s Own Motion to Consider Restructuring of the Electric Utility Industry*, MPSC Case Nos. U-11290 & U-12134, Opinion and Notice of Hearing, Sep 14, 1999 (“*Order Initiating Case*”) (Appellants’ Appendix pp 47a-50a).

¹² *Order Initiating Case*, p 3 (Appellants’ Appendix p 49a.)

¹³ *Id.*

¹⁴ MCL 24.201 *et seq.*

¹⁵ MCL 460.10 *et seq.*

entities. The code of conduct established under this subsection shall also be applicable to electric utilities and alternative electric suppliers consistent with section 10, this section, and sections 10b through 10bb.”¹⁶

Following enactment of the Customer Choice and Electricity Reliability Act, MAFC moved to Reopen, Re-Notice, and Supplement Proceedings in Light of 2000 PA 141 on June 16, 2000.¹⁷ Three days later, the Commission issued an Opinion and Order, reopening and remanding the already existing proceeding, to allow the parties to determine how to proceed.¹⁸ On June 23, DECo filed a Response to MAFC’s Motion encouraging the Commission:

“to retain the existing record, provide notice to other Electric Utilities and Alternative Electric Suppliers known to be operating in Michigan and permit them to submit testimony, provide for rebuttal testimony by all parties, and set a briefing schedule for all parties. Interestingly, 2000 PA 141 Sec. 10a(4) does not appear to require a contested case proceeding to arrive at a Code of Conduct, which would permit the Commission to simply provide all Michigan Electric Utilities and Alternative Electric Suppliers the opportunity to file briefs based on the existing record.”¹⁹

The Administrative Law Judge (“ALJ”), assigned to the proceeding, held a hearing on June 27, 2000, at which it was determined that the ALJ would “renote the case to all electric utilities in Michigan and all known alternative suppliers and reconvene for another prehearing

¹⁶ MCL 460.10a(4).

¹⁷ *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134, MAFC’s Motion to Reopen, Re-Notice, and Supplement Proceedings in Light of 2000 PA 141 and Motion for Immediate Consideration, filed June 16, 2000 (Appellee MAFC’s Appendix pp 2b-7b).

¹⁸ *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134, Opinion and Order, June 19, 2000, p 2, (Appellants’ Appendix, pp 51a-53a) (“*Order Reopening Proceeding*”).

¹⁹ *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134, Response of the Detroit Edison Company to MAFC Motion to Reopen, Re-Notice and Supplement Proceedings in Light of 2000 PA 141, filed June 23, 2000 (Appellee MAFC’s Appendix p 7).

conference for the remainder of the case.”²⁰ A prehearing conference was held on July 12, 2000, at which the interventions of Independent Power Suppliers Coordination Group and Fiber Link, Inc. were granted.

Including additional testimony and cross-examination that was held after the case was reopened and an additional evidentiary hearing held pursuant to the APA,²¹ the evidentiary record in this proceeding consists of 11 transcript volumes, totaling 848 pages, and 30 exhibits. Twelve parties, including the Appellants and MAFC, briefed the issues to the Commission. Ten parties, including the Appellants and MAFC, filed reply briefs.

As directed by the Legislature, exactly 180 days after the enactment of the Customer Choice and Electricity Reliability Act on December 4, 2000, the Commission issued an Opinion and Order²² establishing the Code of Conduct.

Unwilling to accept the Code of Conduct’s limitations on the application of their monopolistic advantage, and the Code of Conduct’s limitation on their ability to cross-subsidize, share information, and grant preferential treatment, between their regulated and unregulated services, MECA, DECo and CECo filed with the Commission a Joint Statement of Statutory Interpretation, Request for Immediate Interim Revision to §VI of Code of Conduct and

²⁰ *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No U-12134, transcript of proceeding below, vol 9, p 688 (Appellants’ Appendix, p 54a).

²¹ MCL 24.201 *et seq.*

²² *Code of Conduct Order*.

Preservation of Rights Per MCR 7.209(A)(2) on January 3, 2001.²³ The Joint Statement Request asked the Commission to make an immediate interim revision to §IV of the Code of Conduct so that compliance plans²⁴ would be due within 90 days of the Commission's final order addressing various petitions for rehearing rather than 90 days from the December 4, 2000, issuance of the Commission's *Code of Conduct Order*. The Joint Statement Request also asked that the Commission stay the Code of Conduct proceedings pursuant to MCR 7.209(A)(2). On the same day that the Joint Statement Request was filed, MECA, DECo, CECo, Unicom Energy, and Energy Michigan filed Petitions for Rehearing and Clarification of the *Code of Conduct Order*.

The day before responses to the Joint Statement Request were due to be filed, pursuant to Rule 403(a) of the Commission's Rules of Practice and Procedure,²⁵ the Commission ruled on the utilities' request, granting it in part.²⁶ The Commission granted electric utilities and alternative electric suppliers "until 60 days following issuance of the upcoming order on

²³ *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134, Appellants' Joint Statement of Statutory Interpretation, Request for Immediate Interim Revision to §VI of Code of Conduct and Preservation of Rights Per MCR 7.209(A)(2), filed Jan 3, 2001 (Appellee MAFC's Appendix pp 52b-58b) ("Joint Statement Request").

²⁴ Section VI of the Code of Conduct requires each electric utility and alternative electric supplier to file a compliance plan that: A.) designates a corporate officer to oversee compliance with the Code of Conduct and serve as the Commission's primary contact regarding compliance with the code; B.) includes an affidavit signed by the designated corporate officer certifying that the electric utility or alternative electric supplier will comply fully with the Code of Conduct; and, C.) includes a clear organization chart of the parent or holding company showing all regulated entities and affiliates and a description of all services and products provided between the regulated entity and its affiliates. When filing compliance plans, the utilities also have the opportunity to request waivers from various provisions of the Code of Conduct. *Code of Conduct Order*, Ex A, p 4 (Appellants' Appendix, p 81a).

²⁵ 1999 MAC R 460.17403(2).

²⁶ *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134, Order, Jan 23, 2001 ("Order Denying Stay") (Appellants' Appendix, pp 82a-85a).

rehearing, reconsideration, and clarification in this case to file [their] respective Code of Conduct compliance plan[s].”²⁷ The Commission declined to rule on the Joint Statement Request for a stay of proceedings pursuant to MCR 7.209(A)(2) in its *Order Denying Stay*. On January 24, 2001, several parties, including MECA, filed Replies to the Petitions for Rehearing and Clarification and the Joint Statement Request.

The Commission ruled on the Petitions for Rehearing and Clarification on October 29, 2001, and made several revisions to the Code of Conduct.²⁸ Pursuant to the Code of Conduct and Commission Orders, numerous electric utilities and alternative electric suppliers, including the Appellants, filed Code of Conduct compliance plans and waiver requests on December 28, 2001. CECo and DECo asked the Commission to grant them widespread waivers that would have decimated the Code of Conduct and rendered such nugatory. On January 30, 2002, MAFC filed Objections to CECo’s and DECo’s waiver requests noting that the waivers that CECo and DECo sought “would produce the unreasonable result of continuing the status quo, without the changes envisioned by the Commission and the Legislature to allow for the development or functioning of a competitive market.” On March 19, 2002, DECo filed a response to MAFC’s Objections, alleging that such objections were “not permitted or provided for in the underlying

²⁷ *Id* at 3 (Appellants’ Appendix, p 84a).

²⁸ *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134, Order on Rehearing, Oct 29, 2001 (“*Code of Conduct Order on Rehearing*”) (Appellants’ Appendix, pp 89a-107a).

case proceeding, the Code of Conduct, or the Rules of Practice and Procedure Before the Commission.”²⁹

On October 3, 2002, the Commission issued a series of Orders approving some Code of Conduct Compliance Plans and waiver requests and rejecting portions of others.³⁰ In the *CECo Waiver Order* and the *DECo Waiver Order*, the Commission specifically applied the Code of Conduct to those areas in which CECo and DECo compete with members of MAFC.

“One way to assure that a utility’s resources are not being used to unfairly subsidize these business activities or to unfairly influence the local markets is to require full functional separation, preferably through an affiliate, for heating and air conditioning services; i.e., to deny the requested waivers for heating and air conditioning services. . . . For the company’s appliance service plan, customer-requested services, and heating and air conditioning sales, the Commission will require that heating and air conditioning services be provided through full functional separation, preferably through a separate affiliate, i.e. no waivers will be granted for these

²⁹ *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134, Response of The Detroit Edison Company to Michigan Alliance for Fair Competition’s Objections to The Detroit Edison Company’s Request for Waivers from the Code of Conduct, filed Mar 19, 2002 (Appellee MAFC’s Appendix p 61b).

³⁰ *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134, Opinion and Order, Oct 3, 2002 (“*Waiver Order*”) (Appellants’ Appendix, pp 121a-130a); *CECo Waiver Order* (Appellants’ Appendix, pp 141a-149a); *DECo Waiver Order* (Appellants’ Appendix, pp 131a-140a); *Cooperative Waiver Order* (Appellants’ Appendix, pp 150a-160a); *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134 (NSP-W), Opinion and Order, Oct 3, 2002 (“*NSP-W Waiver Order*”) (Appellants’ Appendix, pp 161a-167a); *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134 (WEPCo/Edison Sault), Opinion and Order, Oct 3, 2002 (“*WEPCo Waiver Order*”) (Appellants’ Appendix, pp 168a-173a); *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134 (WPS Corp/UPPCo), Opinion and Order, Oct 3, 2002 (“*WPS Waiver Order*”) (Appellants’ Appendix, pp 174a-181a).

programs and any other heating and air conditioning services that are actively marketed or promoted by the utility.”³¹

In addition, the Commission granted several of CECo’s and DECo’s waiver requests conditioned on the utilities adopting certain reporting requirements. And the Commission denied several of the Cooperatives’ waiver requests with respect to their propane gas offerings.

C. Relevant Appellate Proceedings and Rulings.

a. Initial Appeal of the Code of Conduct

On November 20, 2001, the Appellants appealed the *Code of Conduct Order on Rehearing* to the Court of Appeals. The Court consolidated the three appeals, on its own motion, on December 4, 2001.³²

With their appeals, the Appellants moved the Court of Appeals to stay enforcement of the Code of Conduct pending resolution of their appeals. On December 7, 2001, the Michigan Alliance for Fair Competition, Association for Businesses Advocating Tariff Equity, Energy Michigan, and the Commission filed Answers and Briefs in Opposition to the Motions for Stay. The Court of Appeals denied the Motions for Stay on December 14, 2001.³³

Using the *Waiver Orders* as a pretext, on October 18, 2002 Appellant CECo filed a Renewed Motion for Stay Pending Appeal with the Court of Appeals. On November 8, 2002, the Court of Appeals denied the Renewed Motion for Stay.³⁴

³¹ *CECo Waiver Order*, p 4 (Appellants’ Appendix, p 144a); *DECo Waiver Order* p 5 (Appellants’ Appendix, p 135a).

³² *Detroit Edison Co v Public Serv Comm’n*, unpublished order of the Court of Appeals, Dec 4, 2001 (Docket Nos. 237872, 237873, 237874) (Appellee MAFC’s Appendix p 59b).

³³ *Detroit Edison Co v Public Serv Comm’n*, unpublished order of the Court of Appeals, Dec 14, 2001 (Docket Nos. 237872, 237873, 237874) (Appellee MAFC’s Appendix p 60b).

³⁴ *Michigan Elec Coop Ass’n v Public Serv Comm’n*, unpublished order of the Court of Appeals, Nov 8, 2002 (Docket Nos. 237872, 237873) (Appellee MAFC’s Appendix p 64b).

On November 15, 2002, Appellants CECo and MECA filed an interlocutory Application for Leave to Appeal the Code of Conduct and the Court of Appeals' denial of the Renewed Motion for Stay to this Court, raising many of the same issues raised in their current Applications for Leave to Appeal. This Court rejected the arguments raised by the Appellants in their initial Application for Leave to Appeal³⁵ and implicitly found that such Applications did not meet the standards established in MCR 7.302(B).

On March 2, 2004, the *Court of Appeals Decision* was issued. In the *Court of Appeals Decision*, the Court found that:

- “the PSC did not abuse its discretion in holding that it was granted broad authority to enact a Code of Conduct to govern services unrelated to retail open access,” and “was correct by asserting that the Legislature used expansive language to describe the scope of the Code of Conduct.”³⁶
- the Code of Conduct was properly implemented through a contested case proceeding and that “the Code of Conduct is not a rule [as that term is used in the APA] because it was implemented via orders entered in a contested case.”³⁷
- the Appellant did not demonstrate that the Code of Conduct would “unlawfully infringe upon their management activities,”³⁸ as this Court has prohibited in *Union Carbide Corp v Public Service Comm’n*.³⁹
- the Appellant failed to demonstrate that the Code of Conduct “is preempted by federal law in that they have not established that Congress clearly intended that federal law preempt state law in this particular area, does not point to a specific conflict between state and federal law, and do not show that utilities would be unable to comply with both federal and state law.”⁴⁰

³⁵ *Michigan Elec Coop Ass’n v Public Serv Comm’n*, 468 Mich 858; 658 NW2d 483 (2003).

³⁶ *Court of Appeals Decision*, 261 Mich App at 10.

³⁷ *Id* at 11.

³⁸ *Id* at 13.

³⁹ 431 Mich 135; 428 NW2d 322 (1988).

⁴⁰ *Court of Appeals Decision*, 261 Mich App at 14.

- the “Code of Conduct is not unconstitutionally vague.”⁴¹
- the Appellants’ “constitutional claims are speculative and have no factual context.”⁴²

The Court of Appeals unanimously affirmed the Commission’s orders and the Code of Conduct.⁴³

On April 13, 2004, the Appellants filed Applications for Leave to Appeal the *Court of Appeals Decision*, which affirmed the MPSC’s establishment of the Code of Conduct. This Court granted those Applications for Leave to Appeal, but limited argument solely to “whether the December 2000 and October 2001 orders of the Michigan Public Service Commission are unlawful because they were not promulgated in conformity with the rule-making provisions of the Administrative Procedures Act, MCL 24.201 *et seq*”⁴⁴

b. Second Appeal of the Code of Conduct

On October 18, 2002, the Appellants, individually, appealed to the Court of Appeals from the Commission’s October 3, 2002 *Waiver Orders*. The Court of Appeals, on its own motion on November 27, 2002, consolidated the Appellants appeals.⁴⁵

On August 17, 2004, the Court of Appeals again unanimously upheld and affirmed the Code of Conduct.⁴⁶ In the *Second Court of Appeals Decision*, the Court of Appeals found that:

⁴¹ *Id* at 15.

⁴² *Id* at 16.

⁴³ *Id*.

⁴⁴ *Detroit Edison Co v Public Serv Comm’n*, ___ Mich ___, 688 N.W.2d 510 (2004).

⁴⁵ *Michigan Elec Coop Assn v Public Serv Comm’n*, unpublished order of the Court of Appeals, Nov 27, 2002 (Docket Nos. 244425, 244429, 244531) (Appellee MAFC’s Appendix p 65b).

⁴⁶ *Michigan Elec Coop Assn v Public Serv Comm’n*, unpublished per curium opinion of the Court of Appeals, Aug 17, 2004 (Docket Nos. 244425, 244429, 244531) (“*Second Court of Appeals Decision*”) (Appellee MAFC’s Appendix pp 106b-111b).

- each of the arguments made by the Appellants were “raised and rejected in appellants’ [initial] appeals of the PSC’s orders adopting the Code of Conduct.”⁴⁷
- “[t]he PSC had the statutory authority to require appellants to conduct unregulated activities in compliance with the Code of Conduct, *Consumers Power Co v Public Service Comm’n*, 460 Mich 148, 155-159; 596 NW2d 126 (1995), and did not exceed its authority by denying appellants’ requests for waivers for unregulated activities not directly related to retail open access.”⁴⁸
- there does not exist a conflict between the initial *Court of Appeals Decision* and *In re Public Service Commission Guidelines for Transactions Between Affiliates*,⁴⁹
- “because the Code of Conduct does not usurp management prerogatives and is neither unconstitutionally vague nor preempted by federal law, the *Waiver Orders*, which determine whether and in what manner the Code of Conduct applies to specific activities undertaken by the utilities but do not require utilities to either cease any activities or commence engaging in particular activities, are similarly valid.”⁵⁰

The Court of Appeals unanimously affirmed the Commission’s orders, including the *Waiver Orders*, and the Code of Conduct.⁵¹ On September 7, 2004, Appellant CECo filed a Petition for Rehearing of the *Second Court of Appeals Decision*. That Petition was denied in an unpublished order issued by the Court of Appeals on October 12, 2004.⁵²

On September 28, 2004, Appellants MECA and DECo filed Applications for Leave to Appeal the *Second Court of Appeals Decision*. On November 23, 2004, Appellant CECo filed an instant Application for Leave to Appeal the *Second Court of Appeals Decision* with this

⁴⁷ *Id* at 5.

⁴⁸ *Id*.

⁴⁹ *In re Public Service Commission Guidelines for Transactions Between Affiliates*, 252 Mich App 254; 652 NW2d 1 (2002) (“*Affiliate Transaction Guidelines*”).

⁵⁰ *Second Court of Appeals Decision* at 6.

⁵¹ *Id*.

⁵² *Consumers Energy Co v Public Serv Comm’n*, unpublished order of the Court of Appeals, Oct 12, 2004 (Docket No. 244429) (Appellee MAFC’s Appendix p 126b).

Court. The Applications for Leave to Appeal the *Second Court of Appeals Decision* are pending with this Court.⁵³

D. Additional Relevant Proceedings.

MCR 7.212(C)(6)(g) requires Statement of Facts to contain “any other matters necessary to an understanding of the controversy and the questions involved.” Because Michigan law specifically states that “[a]ll rates, fares, regulations, practices, and services set forth by the Commission are presumed *prima facie* to be lawful and reasonable until finally found otherwise....”⁵⁴ the Code of Conduct has been in effect and enforceable since December 4, 2000. The Commission has found, on two occasions, Appellant CECo in violation of the Code of Conduct and has a pending proceeding against Appellant DECo regarding an alleged violation of the Code of Conduct. These Commission proceedings should help this Court understand the blatant disregard the Appellants hold for the Code of Conduct and the Commission’s authority.

a. The Commission has found, on two occasions, that Appellant CECo has violated the Code of Conduct.

On February 23, 2003, the Commission issued an Opinion and Order,⁵⁵ and on May 28, 2003 issued an Opinion and Order on Rehearing,⁵⁶ in response to the July 11, 2001

⁵³ *Michigan Elec Coop Ass’n v Public Serv Comm’n*, Docket Nos. 127099, 127100, 127101; *Detroit Edison Co v Public Serv Comm’n*, Docket No. 127094; *Consumers Energy Co v Public Serv Comm’n*, Docket No. 127473.

⁵⁴ MCL 462.25. See, *Attorney General v Public Service Comm’n*, 237 Mich App 82, 88; 602 NW2d 225 (1999); *Michigan Consolidated Gas Co v Public Service Comm’n*, 389 Mich 624, 635-636, 209 NW2d 210 (1973).

⁵⁵ *Forner v Consumers Energy Co*, MPSC Case No. U-13089, Opinion and Order, Feb 20, 2003 (Appellee MAFC’s Appendix pp 66b-94b).

⁵⁶ *Forner v Consumers Energy Co*, MPSC Case No U-13089, Opinion and Order, May 28, 2003 (Appellee MAFC’s Appendix pp 95b-98b).

Complaint of Phillip D. Forner, the president and a full-time employee of a company providing heating, ventilating, and air conditioning (HVAC) services in Ottawa County, Michigan, against the Appellant. In its Opinion and Order, the Commission found that certain Appliance Service Plan (“ASP”) activities of Appellant CEC Co violated provisions of the Commission’s Code of Conduct.⁵⁷

Despite having not taken exception to the ALJ’s proposed findings that CEC Co had violated the Code of Conduct, pursuant to Section 81 of the APA,⁵⁸ CEC Co appealed the Commission’s decision to the Court of Appeals. The parties to this Appeal agreed to a stipulated dismissal of the appeal, which was granted on November 9, 2004.⁵⁹

Following complaints alleging that Appellant CEC Co had “used its newsletter, a billing insert, to promote its ASP program in a billing,”⁶⁰ in violation of the Code of Conduct, on May 28, 2003, the Commission issued an Order to Show Cause requiring CEC Co to “demonstrate its compliance with the Commission’s February 20, 2003 Order in Case No. U-12134.”⁶¹ On September 21, 2004, the Commission found that CEC Co “has engaged in a pattern and practice of

⁵⁷ *Forner v Consumers Energy Co*, MPSC Case No. U-13089, Opinion and Order, Feb 20, 2003.

⁵⁸ MCL 24.281. In *Attorney General v Public Serv Comm’n*, 136 Mich App 52; 355 NW2d 640 (1984), the Court of Appeals ruled that a party who does not file exceptions to a PFD, pursuant to Section 81 of the APA, has not preserved the issues for appeal.

⁵⁹ *Consumers Energy Co v Public Serv Comm’n*, unpublished Order of the Court of Appeals, Nov 9, 2004 (Docket No. 249319) (Appellee MAFC’s Appendix p127b).

⁶⁰ *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134, Order to Show Cause, May 28, 2003, p 2 (Appellee MAFC’s Appendix p 100b).

⁶¹ *Id.*

ignoring the Code of Conduct and Commission orders and, therefore, order[s] Consumers to cease and desist from further violations of the Code of Conduct.”⁶²

b. The Commission has a Show Cause proceeding pending against Appellant DECo for alleged violations of the Code of Conduct.

Following complaints alleging that Appellant DECo had used “billing inserts to promote the appliance maintenance programs of its subsidiaries”⁶³ in violation of the Code of Conduct, on March 16, 2004, the Commission issued an Order to Show Cause requiring DECo to “demonstrate its compliance with the Commission’s Orders in Case No. U-12134 or show cause why it should not be found in violation of that order.”⁶⁴ The Show Cause Order against DECo is currently pending before the Commission.

c. Public Act 88 of 2004.

Having failed to get the Code of Conduct overturned by the Court of Appeals, the Appellants turned to the Legislature for the passage of Public Act 88 of 2004. On April 22, 2004, Governor Jennifer M. Granholm signed into law 2004 PA 88 (“Act 88”).⁶⁵ This law, which was given immediate effect, established operating guidelines for ASPs offered by electric utilities and specifically focuses the applicability of the Code of Conduct, vis-à-vis ASPs.

⁶² *In the Matter on the Commission’s Own Motion, Investigate Consumers Energy Company’s Compliance with the Code of Conduct Adopted Pursuant to MCL 460.10a(4)*, MPSC Case No. U-13830, Opinion and Order, Sept 21, 2004, pp 12-13 (Appellee MAFC’s Appendix pp 122b-123b).

⁶³ *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company; In the Matter, on the Commission’s Own Motion to Require the Detroit Edison Company to Show Cause why it Should not be Determined to be in Violation of the Code of Conduct Adopted in Case No. U-12134*, MPSC Case Nos. U-12134 and U-14072, Order to Show Cause, Mar 16, 2004, p 2 (Appellee MAFC’s Appendix p 103b).

⁶⁴ *Id.*

⁶⁵ MCL 460.10a(5) – MCL 460.10a(11).

“An electric utility may offer its customers an appliance service program. Except as otherwise provided by this section, ***the utility shall comply with the code of conduct*** established by the commission under subsection (4). As used in this section, ‘appliance service program’ or ‘program’ means a subscription program for the repair and servicing of heating and cooling systems or other appliances.”⁶⁶

Though the Appellants argue that the Code of Conduct, were it promulgated through rule-making, would have been subject to review by the Joint Committee on Administrative Rules,⁶⁷ they fail to recognize that through the passage of Act 88, the Legislature reviewed the Code of Conduct and reaffirmed the legislative intent establishing the Code of Conduct. Further the Legislature specifically enacted that utilities, “[e]xcept as otherwise provided by this section, the utility shall comply with the Code of Conduct established by the commission under subsection (4)”⁶⁸ for other unregulated activities.

STANDARD OF REVIEW

Michigan law specifically states that “[a]ll rates, fares, regulations, practices, and services set forth by the Commission are presumed *prima facie* to be lawful and reasonable until finally found otherwise....”⁶⁹ MAFC agrees with Appellants, that the burden of proof in this proceeding is on the Appellants to “show by clear and satisfactory evidence” that the *Code of Conduct Order* is unlawful or unreasonable.⁷⁰ Commission orders are considered “unlawful only if they are

⁶⁶ MCL 460.10a(5) (emphasis added).

⁶⁷ MECA Brief, p 20.

⁶⁸ MCL 460.10a(5).

⁶⁹ MCL 462.25; *See, Attorney General v Public Serv Comm’n*, 237 Mich App 82, 88; 602 NW2d 225 (1999); *Michigan Consolidated Gas Co v Public Serv Comm’n*, 389 Mich 624, 635-636; 209 NW2d 210 (1973).

⁷⁰ MCL 462.26(8). *See, Michigan Consolidated Gas Co v Public Serv Comm’n*, 389 Mich at 639; *CMS Energy Corp v Attorney General*, 190 Mich App 220, 228; 475 NW2d 451 (1991).

based on an erroneous interpretation or application of the law, and it is unreasonable if it is not supported by the evidence.”⁷¹ The Court of Appeals has held that “a reviewing court must give due deference to the administrative expertise of the MPSC and may not substitute its judgment for that of the agency.”⁷²

Where the Appellants have raised questions of fact, MAFC contends that the burden of proof in this proceeding is on the Appellants to demonstrate that the Commission’s findings were not “supported by competent, material and substantial evidence on the whole record.”⁷³

MAFC agrees with the Appellants that issues of statutory interpretation are questions of law⁷⁴ and that this Court has a duty to interpret statutory language and legislative intent.⁷⁵ However, MAFC asserts that the Commission’s interpretation of the Customer Choice and Electricity Reliability Act should be given a considerable degree of deference. The Court of Appeals has held that “[g]reat deference is due the construction of a statute by the agency legislatively chosen to enforce it, which ought not be overruled without cogent reasons.”⁷⁶ The Court of Appeals has also held that “[a]n agency’s initial interpretation of new legislation is not entitled to the same measure of deference as is a longstanding interpretation. However, merely establishing that another interpretation of a statute is plausible does not satisfy a party’s burden

⁷¹ *Attorney General v Public Serv Comm’n*, 249 Mich App 424, 429; 642 NW2d 691 (2002). See also, *Associated Truck Lines, Inc v Public Serv Comm’n*, 377 Mich 259; 140 NW2d 515 (1966); *Attorney General v Public Serv Comm’n*, 231 Mich App 76, 77-78; 585 NW2d 310 (1998).

⁷² *Attorney General v Public Serv Comm’n*, 249 Mich App at 429. See also, *Attorney General v Public Serv Comm’n*, 244 Mich App 401, 406; 625 NW2d 786 (2001).

⁷³ Mich Const 1963 art 6, § 28.

⁷⁴ *Id.*

⁷⁵ *Attorney General v Public Serv Comm’n*, 249 Mich App at 429.

⁷⁶ *Telephone Ass’n of Michigan v Public Serv Comm’n*, 210 Mich App 662, 670; 690 NW2d 854 (2000).

of proving by clear and convincing evidence that the PSC's interpretation is unlawful or unreasonable."⁷⁷ MAFC contends that the legislative intent is clear in this proceeding and the Appellants cannot and have not met their burden of showing, by clear and convincing evidence, that the Commission's interpretation of the Customer Choice and Electricity Reliability Act, in choosing the method for establishing the Code of Conduct is either unlawful or unreasonable.

ARGUMENT

I. The Court of Appeals correctly found that the Code of Conduct was not a rule and was properly implemented via orders entered in a contested case proceeding.

The Appellants argue that the Commission's Orders establishing the Code of Conduct are invalid because the Commission failed to promulgate the Code of Conduct pursuant to the rule-making procedures contained in the APA.⁷⁸ The *Court of Appeals Decision* correctly "disagree[d] with this argument"⁷⁹ and the *Second Court of Appeals Decision*, likewise, found that "the contested case proceeding" used to develop the Code of Conduct "afforded all participants due process of law, and produced a Code of Conduct and *Waiver Orders* that were supported by the requisite evidence."⁸⁰

Despite the fact that "in Michigan, the preferred method of agency policymaking is by the promulgation of rules,"⁸¹ the *Court of Appeals Decision* found that the Code of Conduct was

⁷⁷ *In re Michigan Cable Telecomms Assn Complaint*, 239 Mich App 686, 690; 609 NW2d 854 (2000).

⁷⁸ MCL 24.201 *et seq.*

⁷⁹ *Court of Appeals Decision*, 261 Mich App at 10.

⁸⁰ *Second Court of Appeals Decision*, p 6 (Appellee MAFC's Appendix p 111b)

⁸¹ *Court of Appeals Decision*, 261 Mich App at 10., citing, *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Services*, 431 Mich 172, 185; 428 NW2d 335 (1988).

not a rule, “because it was implemented via orders entered in a contested case.”⁸² In addition, the *Court of Appeals Decision* noted several other exceptions from rule-making contained in the APA that are applicable to the way the Commission established the Code of Conduct.⁸³

This argument is without merit since Michigan Courts and the APA provide for the development of certain Commission policies by rule or order.

a. The rule-making requirements of the APA do not apply to an order in a contested case.

Michigan Courts have held that “the rule-making requirement of the APA does not apply to ‘[a] determination, decision, or order in a contested case’ MCL 24.207(f).”⁸⁴ Section 207(f) of the APA specifically excludes “a determination, decision, or order in a contested case”⁸⁵ from the definition of a rule. It will never be known whether or not the Commission could have effectively promulgated the Code of Conduct under rule-making within the required 180 days.⁸⁶ But what is known is that such a massive undertaking would have disregarded the significant work-product of a contested case proceeding regarding DECo’s and CECos, then existing, Codes of Conduct. The disregard of which would have run counter to the Rules of Practice and Procedure before the Commission, which require that “[t]hese rules be liberally construed to secure a just, economical, and expeditious determination of the issues presented.”⁸⁷ As

⁸² *Court of Appeals Decision*, 261 Mich App at 11.

⁸³ *Id* at 11-12.

⁸⁴ *Northern Michigan Exploration Co v Public Serv Comm’n*, 153 Mich App 635, 649; 396 NW2d 487 (1986).

⁸⁵ MCL 24.207(f).

⁸⁶ The 180 days was statutorily required under Section 10a(4) of the Customer Choice and Electricity Reliability Act.

⁸⁷ 1999 MAC R 460.17103(2).

extensively discussed in the MAFC's Counter-Statement of Material Proceedings and Facts,⁸⁸ this proceeding was commenced almost one year prior to the enactment of the Customer Choice and Electricity Reliability Act, and had yet to conclude when the Customer Choice and Electricity Reliability Act was signed into law.⁸⁹ Prior to the issuance of the Court of Appeals' ruling in *Affiliate Transaction Guidelines*,⁹⁰ no party disputed the fact that this proceeding was a contested case, held pursuant to the APA. Michigan Courts have held that when a contested case is conducted administrative agencies can establish legislatively mandated policy through such contested case procedures.

One example of where Courts have held that administrative agencies can establish legislatively mandated policy through rule-making procedures or contested case procedures was in *Northern Michigan Exploration*. In *Northern Michigan Exploration*, the plaintiff challenged the legality of the Commission's adoption of a 90-10 net pay proration formula as being an application of a policy that had not been promulgated as a rule under Section 33 of the APA.⁹¹ The Court rejected Northern Michigan Exploration's challenge, finding that its "jurisdiction is limited to determining whether the commission acted within the power and authority delegated to it by the Legislature."⁹² The Court of Appeals rejected the plaintiff's contention that a rule-making procedure was required because:

"it is settled that an agency has the option of setting standards either pursuant to the rule-making provisions of the APA or case by case through adjudication. See, for example, *American Way Life*

⁸⁸ *Supra*, pp 4-11.

⁸⁹ *Supra*, p 5.

⁹⁰ 252 Mich App 254; 652 NW2d 1 (2002).

⁹¹ MCL 24.233.

⁹² *Northern Michigan Exploration*, 153 Mich App at 649.

Ins Co v Ins Comm'r, 131 Mich App 1; 345 NW 2d 634 (1983), *lv den* 419 Mich 937 (1984); *DAIIE v Comm'r of Ins*, 119 Mich App 113; 326 NW 2d 444 (1982); *Michigan Life Ins Co v Ins Comm'r*, 120 Mich App 552; 328 NW2d 82 (1982).”⁹³

Another example of where Michigan Courts found that administrative policies may be created through contested case proceedings was in *American Way Life Ins Co v Insurance Comm'r*:⁹⁴

“[A]n administrative agency need not always promulgate rules to cover every conceivable situation before enforcing a statute. Specifically, an administrative agency may announce new principles through adjudicative proceedings in addition to rule-making proceedings. The United States Supreme Court stated in *Securities & Exchange Comm v Chenery Corp*, 332 US 194, 202; 67 S Ct 1575; 91 L Ed 1995 (1947):

‘Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.’

* * *

Section 107 of the APA, MCL 24.207; MSA 3.560(107), provides that a rule is a ‘statement, standard, policy, ruling or instruction of general applicability.’ The APA definition of a rule expressly excludes any “order establishing or fixing rates”, MCL 24.207(c); MSA 3.560(107)(c), and any ‘determination, decision or order in a contested case’, MCL 24.207(f); MSA 3.560(107)(f).”⁹⁵

⁹³ *Id.*

⁹⁴ 131 Mich App 1; 345 NW 2d 634 (1983).

⁹⁵ *American Way Life Ins*, 131 Mich App at 5-7, citing, *DAIIE v Commissioner of Ins*, 119 Mich App 113, 117-118; 326 NW 2d 444 (1982).

Yet another example is where the Court of Appeals reviewed a Commission requirement regarding how CECo's contracts must conform with CECo's tariffs in *Midland Cogeneration Venture, LP v Public Serv Comm'n*.⁹⁶ In *Midland Cogeneration* the Court found that "[t]he PSC may establish such standards in the context of a contested-case proceeding in lieu of the rule-making procedures of the Administrative Procedures Act."⁹⁷

The Commission, in order to effectively administer Section 10a(4) of the Customer Choice and Electricity Reliability Act, and to secure a just, economical, and expeditious determination, without disregarding the extensive record previously created, chose to continue a contested case proceeding to establish the Code of Conduct, in lieu of rule-making procedures. In the *Court of Appeals Decision*, the Court of Appeals recognized this proceeding as "a contested case proceeding, docketed as Case No. U-12134, to determine what modifications, if any, should be made to the codes of conduct."⁹⁸ In the *Second Court of Appeals Decision* the Court noted that it did not, in the *Court of Appeals Decision*, discuss whether or not the Commission's proceeding was a contested case proceeding "because the MPSC clearly named a party, and it was truly a 'contested case.'"⁹⁹ Close to two-dozen parties participated in that contested case proceeding, testimony was presented, witnesses were cross-examined, and briefs and reply briefs were filed. An evidentiary record was established consisting of 11 transcript volumes, totaling 848 pages and 30 exhibits. Appellants' argument that the Commission engaged in invalid rule-making lacks merit, since extensive due process was granted to all parties

⁹⁶ 199 Mich App 286; 501 NW2d 573 (1993).

⁹⁷ 199 Mich App at 310, citing, *Northern Michigan Exploration*, 153 Mich App at 649.

⁹⁸ 261 Mich App at 11.

⁹⁹ *Second Court of Appeals Decision*, at p 5, n 4 (Appellee MAFC's Appendix p 110b).

through the Commission's establishment of the Code of Conduct by Order in a contested case proceeding — an establishment permitted by MCL 24.207(f) and the Court cases cited above.

b. The rule-making requirements of the APA do not apply to an exercise in permissive statutory power.

The Code of Conduct is an exercise in permissive statutory power. Each of the Appellants chose to point out to the Court the definition of a “rule” under the APA.¹⁰⁰ But they failed to adequately review the APA's exception to the definition of a rule for “a decision by an agency to exercise or not to exercise permissive statutory power, although private rights or interests are affected.”¹⁰¹ This statutory exception is critical to any discussion of whether or not the Commission impermissibly failed to conduct rule-making procedures, because the Code of Conduct is an exercise of permissive statutory power. As an exercise of permissive statutory authority, the establishment of the Code of Conduct is exempt from formal adoption and promulgation under the rule-making procedures contained in the APA.¹⁰²

Among the cases highlighting the exception from rule-making procedures for permissive statutory power is *Michigan Trucking Ass'n v Public Serv Comm.*¹⁰³ As with the Code of Conduct, in *Michigan Trucking*, the Commission was given a specific amount of time in which to establish a specific policy. In *Michigan Trucking*, the Legislature required the Commission to “develop and implement by rule or order, a motor carrier safety rating system within 12

¹⁰⁰ MCL 24.207.

¹⁰¹ MCL 24.207(j).

¹⁰² See: *Michigan Trucking Ass'n v Public Serv Comm'n*, 225 Mich App 424, 429-430; 571 NW2d 734 (1997); *Pyke v Department of Social Serv*, 182 Mich App 619, 630-631; 453 NW2d 274 (1990); *Hinderer v Department of Social Serv*, 95 Mich App 716, 724-727; 291 NW2d 672 (1980); *Colombini v Director, Dep't of Social Serv*, 93 Mich App 157; 286 NW2d 77 (1979).

¹⁰³ 225 Mich App 424; 571 NW2d 734 (1997).

months.”¹⁰⁴ The Court of Appeals found that the legislative directive in *Michigan Trucking* was clearly a grant of permissive statutory authority and that to require the Commission to promulgate “hotly contested” rules within a tight statutory time frame would have been impossible:

“In addition, it is reasonable to assume that any safety rating system would be hotly contested by the regulated carriers and that subjecting the safety rating system to the formal hearing and promulgation requirements of the APA would make it impossible for the PSC to have the system in place within twelve months, the time frame prescribed by the statute. ‘In construing a statute, . . . unreasonable results are to be avoided wherever possible.’ *In re Telecommunications Tariffs*, 210 Mich App 533, 541; 534 NW2d 194 (1995). Accordingly, we conclude that the order is valid because it falls within the exception contained in MCL 24.207(j); MSA 3.560(107)(j).”¹⁰⁵

Despite the fact that the Appellants ignore the exception from rule-making procedures for permissive statutory authority, found in MCL 24.207(j), they implicitly and incorrectly argue that the exception does not apply because Section “10a(4) [of the Customer Choice and Electricity Reliability Act] does not authorize the MPSC to ‘issue orders’ for the Code of Conduct’s establishment.”¹⁰⁶ MECA points out that other sections of the Customer Choice and Electricity Reliability Act provide that the commission “shall issue orders” to accomplish various legislative mandates. MAFC contends that the correct way to view the fact that the Legislature required the Commission to issue orders to accomplish various legislative mandates, illustrates that, in the case of the Code of Conduct, the very fact that the Legislature did not require the Commission to establish the Code of Conduct by Order or by rule-making procedures,

¹⁰⁴ 1993 PA 352, MCL 479.43.

¹⁰⁵ *Michigan Trucking*, 225 Mich App at 430.

¹⁰⁶ MECA Brief, p 26.

demonstrates the Legislature’s grant of permissive statutory power to determine how to establish the Code of Conduct. But MECA fails to examine Section 10c of the Customer Choice and Electricity Reliability Act,¹⁰⁷ which provides that “if the Commission finds, after notice and hearing, that an electric utility or alternative electric supplier has not complied with a provision or order issued under sections 10 through 10bb”¹⁰⁸ This language demonstrates clear legislative intent that the Commission was to issue Orders to accomplish the various legislative mandates contained in Sections 10 through 10bb of the Customer Choice and Electricity Reliability Act, of which the directive to establish a Code of Conduct is a part.¹⁰⁹

Further, MECA’s implied argument, that because the Act did not specify that the Commission could establish the Code of Conduct through an order, fails to consider holdings of Michigan Courts that if an administrative “agency’s policy follows from its statutory authority, the policy is an exercise of permissive statutory power and not a rule requiring formal adoption.”¹¹⁰ In *Hinderer*,¹¹¹ the Michigan Court of Appeals held that the Department of Social Services may adopt a policy “of the director’s own choosing,” so long as it complies with the law.¹¹² In establishing the Code of Conduct, the Commission had permissive statutory authority to establish the Code of Conduct by a method of its own choosing, a contested case proceeding.

¹⁰⁷ MCL 460.10c.

¹⁰⁸ MCL 460.10c(1).

¹⁰⁹ MCL 460.10a(4).

¹¹⁰ *Hinderer*, 95 Mich App at 724-727.

¹¹¹ *Id* at 716.

¹¹² *Id*.

c. The establishment of the Code of Conduct must be distinguished from *Affiliate Transaction Guidelines*.

The Appellants primarily rely on the Court of Appeals Order in *Affiliate Transaction Guidelines*¹¹³ for their erroneous arguments that the Code of Conduct was improperly established by the Commission and is invalid because it was not promulgated through rule-making. However, the Appellants fail to note the many facts that distinguish *Affiliate Transaction Guidelines* from the Code of Conduct proceedings and the Commission's consideration of the Appellants Code of Conduct Waiver Requests.

In *Affiliate Transaction Guidelines*, the Court of Appeals vacated the Commission's Guidelines for Transactions Between Affiliates because the Court of Appeals concluded that the procedure utilized by the Commission to develop the Guidelines was invalid under the APA.

There are several significant differences that distinguish the Affiliate Transaction Guidelines, and the Commission's procedure for developing them, from the Code of Conduct. When it chose to revise the Affiliate Transaction Guidelines, the Commission "*sua sponte* issued an order and notice of hearing of a contested case proceeding to consider changes to these guidelines."¹¹⁴ The Commission commenced the initial Code of Conduct proceeding following the adoption of voluntary provisional Codes of Conduct by DECo and CECo and a series of extensive negotiations between various interested parties to reach a consensus permanent Code of Conduct.¹¹⁵ Unlike the Affiliate Transaction Guidelines, the Commission, following the passage of the Customer Choice and Electricity Reliability Act, was statutorily required by the Legislature to establish the Code of Conduct; and to do so within a very tight time frame. The

¹¹³ 252 Mich App 254; 652 NW2d 1 (2002).

¹¹⁴ *Affiliate Transaction Guidelines*, 252 Mich App at 259.

¹¹⁵ *Order Initiating Case*.

Legislature gave the Commission permissive statutory authority to establish the Code of Conduct by a method of its own choosing. And finally, the Legislature gave the Commission direction as to what was to be covered by the Code of Conduct and conferred upon the Commission the ability and authority to issue a Code of Conduct that governed such areas. Thus, the holding in *Affiliate Transaction Guidelines* should not automatically render the Code of Conduct invalid, as the Appellants ask of this Court.

d. The establishment of the Code of Conduct must also be distinguished from the decision of the Maryland Court of Appeals in *Delmarva Power & Light Co v Public Serv Comm’n of Maryland*.

DECo and MECA argue that this Court should follow the Maryland Court of Appeals’ decision in *Delmarva Power & Light Co v Public Serv Comm’n of Maryland*.¹¹⁶ However, just as they fail to distinguish *Affiliate Transaction Guidelines* from the establishment of the Code of Conduct, they likewise fail to distinguish *Delmarva* from the establishment of the Michigan Code of Conduct. While MECA specifically states that *Delmarva* is “nearly factually and legally identical to the case at bar,”¹¹⁷ MECA fails to point out to this Court that the Maryland Public Service Commission did not conduct a contested case proceeding to develop its Code of Conduct. The underlying Maryland Public Service Commission decision specifically notes:

“In this generic proceeding, the Commission solicited the views of interested parties concerning the overall framework for affiliate standards of conduct. Numerous parties responded with detailed recommendations.”¹¹⁸

¹¹⁶ 370 Md 1; 803 A2d 460 (2002).

¹¹⁷ MECA Brief, p 24.

¹¹⁸ *Re Affiliated Activities, Promotional Practices, and Codes of Conduct of Regulated Gas and Electric Companies*, Maryland Pub Serv Comm’n, Case No. 8820, Order No. 76292, July 1, 2000, 202 PUR4th 177, 187.

Following an attempt by the Maryland Legislature to reverse the *Delmarva* decision, the Maryland Court of Appeals had an opportunity, on a Motion for Reconsideration, to reexamine its decision. In its Opinion on Reconsideration, the Court specifically noted that the Maryland Code of Conduct was unlawful because it was not promulgated in conformity with the rule-making provisions of the Maryland Administrative Procedures Act,¹¹⁹ and did not fall into any exemption for contested case procedures because “it had not been entered in a case-specific, contested case proceeding to which any of the utilities were a party.”¹²⁰

Delmarva must therefore be distinguished from the Michigan Code of Conduct because the Michigan Commission’s Code of Conduct proceeding *was* a contested case proceeding “because the MPSC clearly named a party, and it was truly a ‘contested case.’”¹²¹ Thus the Michigan Code of Conduct was properly established through a contested case proceeding, as permitted by MCL 24.207(f)

e. DECo waived any objection to establishing the Code of Conduct by Order when it advocated such a course of action to the Commission.

After the Customer Choice and Electricity Reliability Act was signed into law, DECo was one of the parties that advocated that the Commission continue the previous Code of Conduct contested case proceeding to establish the Code of Conduct under Section 10a(4), urging the Commission:

“to retain the existing record, provide notice to other Electric Utilities and Alternative Electric Suppliers known to be operating in Michigan and permit them to submit testimony, provide for rebuttal testimony by all parties, and set a briefing schedule for all

¹¹⁹ Maryland Administrative Procedures Act, Md Code Ann, State Gov’t § 10-101 *et seq.*

¹²⁰ *Delmarva Power & Light Co v Public Serv Comm’n of Maryland*, 371 Md 356, 378; 809 A2d 640, 653 (2002) (Appellee MAFC’s Appendix p 17b).

¹²¹ *Second Court of Appeals Decision*, at p 5, n 4 (Appellee MAFC’s Appendix p 110b).

parties. Interestingly, 2000 PA 141 Sec. 10a(4) does not appear to require a contested case proceeding to arrive at a Code of Conduct, which would permit the Commission to simply provide all Michigan Electric Utilities and Alternative Electric Suppliers the opportunity to file briefs based on the existing record.”¹²²

Because DECo asserted such a position to the Commission, it should now be precluded, based on the doctrines of judicial estoppel, from taking the position it has asserted in this proceeding, that “[t]he Commission reversibly erred by continuing the ‘contested case’ proceedings.”¹²³ Courts apply the doctrine of judicial estoppel to “preclude[] a party as a matter of law from adopting a legal position in conflict with one earlier taken in the same or related litigation. It prevents a party from ‘playing fast and loose’ with the courts and protects the essential integrity of the judicial and administrative processes.”¹²⁴

When the Commission re-opened the existing record in the Code of Conduct proceeding, in response to the enactment of the Customer Choice and Electricity Reliability Act, the Commission granted DECo more due process than DECo had requested in its Response to MAFC’s Motion to Reopen, Re-Notice and Supplement Proceedings. It can be presumed that had the Commission issued a Code of Conduct that did not place limitations on the application of DECO’s monopolistic advantage, and limitation on its ability to cross-subsidize, share information, and grant preferential treatment, between its regulated and unregulated services, DECo would not be challenging that Code of Conduct on procedural grounds. Only now, because it does not like the Code of Conduct the Commission established, DECo challenges the

¹²² *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, MPSC Case No. U-12134, Response of the Detroit Edison Company to MAFC Motion to Reopen, Re-Notice and Supplement Proceedings in Light of 2000 PA 141, filed June 23, 2000 (Appellee MAFC’s Appendix p 10b).

¹²³ DECo Brief, p 10.

¹²⁴ *Michigan Gas Utils v Public Serv Comm’n*, 200 Mich. App. 576, 583; 505 N.W.2d 27 (1993).

method the Commission used to establish the Code of Conduct; a method previously advocated by DECo. “Courts apply judicial estoppel to prevent a party ‘from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment.’”¹²⁵ Likewise, this Court should preclude DECo’s gamesmanship. DECo has waived any right to challenge the procedural basis used by the Commission to establish the Code of Conduct.

CONCLUSION

The public’s interest demands a Code of Conduct designed to regulate the relationship between a regulated (monopoly) venture and those affiliates offering goods and services in a non-regulated market to foster competition in the state of Michigan. The Legislature recognized this in enacting Section 10a(4) of the Customer Choice and Electricity Reliability Act. The Commission recognized this need in following the legislative mandate of Section 10a(4) of the Customer Choice and Electricity Reliability Act and properly and lawfully established the Code of Conduct through a contested case proceeding.

¹²⁵ *Opland v Kiesgan*, 234 Mich App 352, 364; 594 NW2d 505 (1999), quoting, *Griffith v Wal-Mart Stores, Inc*, 135 F3d 376, 380 (6th Cir, 1998).

For the foregoing reasons the Michigan Alliance for Fair Competition respectfully requests that this Court affirm the Legislature's intent, the Commission establishment of the Code of Conduct, and the *Court of Appeals Decision* by denying the relief requested by the Appellants, in its entirety. And grant such further and consistent relief as is lawful and reasonable.

Respectfully submitted,

CLARK HILL PLC

By: 

Roderick S. Coy (P12290)
Haran C. Rashes (P54883)
212 East Grand River Avenue
Lansing, MI 48906
(517) 318-3100
(517) 318-3099 Fax

Attorneys For
Michigan Alliance for Fair Competition

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